Supreme Court, U.S.
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No. 94-749

In The

Supreme Court of the United States

October Term, 1994

JOHN J. HURLEY, Individually and the SOUTH BOSTON ALLIED VETERANS COUNCIL,

Petitioners,

v.

IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, An Unincorporated Association, By and Through TIMOTHY DALEY, BARBRA KAY, and CATHLEEN FINN, Acting on Their Own Behalf and on Behalf of the Association,

Respondent.

RESPONDENT'S SUGGESTION OF MOOTNESS

JOHN WARD, Of Counsel
ZALKIND, RODRIGUEZ, LUNT & DUNCAN
65A Atlantic Avenue
Boston, MA 02110
(617) 742-6020
Counsel of Record for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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In keeping with counsel's continuing duty to keep the Court apprised, without delay, of any developments which may affect the outcome of the case, *Board of License Commissioners of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985) (per curiam), Respondent respectfully calls the attention of the Court to the following matters, which render the present controversy moot:

> 1. Subsequent to the adverse ruling by the state courts in the present case, Petitioners "enacted Rules and Regulations regarding the theme, the conditions of participation in future parades, and have prepared a document which will be distributed to all future participants,

advising them that they must conform to [Petitioners'] Parade Rules and Regulations." *South Boston Allied War Veterans Council, et al. v. City of Boston, et al.*, C.A. No. 94-11402MLW (D. Mass.) [hereafter "Federal District Court Case"], Petitioners' Verified Complaint, Paragraph 58.

2. On January 17, 1995, the United States District Court for the District of Massachusetts issued a declaratory judgment, based in part on changes made by Petitioners after the adverse rulings in state court, holding "that conditioning the issuance of a permit for [Petitioners'] 1995 St. Patrick Parade on the inclusion of [Respondent] violates [Petitioners'] right of expressive association under the First Amendment of the United States Constitution." Federal District Court Case at 69.

I. INTRODUCTION

In this Memorandum, Respondent will suggest that Petitioners' undertaking to structure future Evacuation Day/St. Patrick's Day Parades in a way materially different from the Parade that gave rise to the judgment of the Supreme Judicial Court, now pending on certiorari in this Court, renders the controversy moot. Respondent's reasoning is as follows: (a) the state courts below made it quite clear that their holding, that application of the state anti-discrimination statute to the Parade did not offend the First Amendment, was predicated upon very specific facts relating to how Petitioners conducted past Parades; (b) Petitioners have made what they contend are material changes in the Parade subsequent to the state court rulings, and have indeed, based on at least some of these

changes, obtained a federal court order excluding Respondent from this year's Parade; (c) as a consequence, the judgment of the Supreme Judicial Court no longer speaks to the current realities of the controversy, and the parties have no real and personal stake in attacking or defending it. A victory for Respondent in this Court would not provide it with the relief granted in the courts below. As for Petitioners, they claim to have changed the rules of the Parade, and thus the facts that were responsible for their defeat, so that a favorable opinion in this Court, while undoubtedly comforting, would be purely advisory. Under these circumstances, this case is moot. *See, e.g., Lewis v. Continental Bank Corp.*, 494 U.S. 472, 478 (1990).

II. FACTUAL AND PROCEDURAL BACKGROUND.

The questions presented to this Court by Petitioners are (1) whether "the Supreme Judicial Court of the Commonwealth of Massachusetts violated the First and Fourteenth Amendment rights of the Petitioners when it compelled the Petitioners to include, in their privately organized Parade, a message the Petitioners deemed unwanted and antithetical" and (2) whether "Petitioners' refusal to include a gay, lesbian, and bisexual message within a private parade can be declared unlawful discrimination by the government without violating the Petitioners' First and Fourteenth Amendment rights." Petition for Certiorari at i and Appendix B at B28.

After a four-day trial, the Massachusetts Superior Court found the following pertinent facts, among others: (1) Petitioners exercised no genuine selectivity in

choosing Parade participants and sponsors; (2) Petitioners had no written procedures for selecting Parade participants or sponsors; (3) Petitioners did not generally inquire into the specific messages or views of each applicant; (4) applications from new groups were voted on in "batches"; (5) some groups participated in the 1993 Parade by simply showing up at the Parade without submitting any application; (6) other groups gained entrance by contribution rather than by the application process; (7) admission procedures were not uniformly applied; and (8) the Petitioners "always opted for heterogeneousness" and diversity rather than focusing on a specific message, theme or group. Petition for Certiorari, Appendix B at B6-B8, B24-B25.

Based on these factual findings, the Superior Court held that Petitioners' event was a public, open, recreational event rather than a private parade and thus was a "public accommodation" within the purview of Mass. G.L. c. 272, § 92A. (*Id.* at B9 and B27). In addition, the Superior Court held that it was "impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment." (*Id.* at B25). However, the Superior Court was careful to note that "[t]his is not to say, ... that the Parade can never become a protected First Amendment activity. It simply has not been one in the past and is not one now." (*Id.* at B25 n.27).

The Massachusetts Supreme Judicial Court affirmed the trial court's factual findings and ruling as to the violation of the state "public accommodations" statute as well as its rejection of the Petitioners' First Amendment claims. At the same time, the Supreme Judicial Court was

careful to note that "[w]e do not suggest that every parade is nonexpressive or that every parade is necessarily a place of public accommodation. Rather, we base our conclusion on the unique nature of the facts found as to the parade in controversy." *Irish-American Gay, Lesbian and Bisexual Group of Boston* ["GLIB"] *v. City of Boston*, 418 Mass. 238, 250 n.18, 636 N.E.2d 1293 (1994); Petition for Certiorari, Appendix C at C13-C14.

After the Supreme Judicial Court issued its Order on March 11, 1994, Petitioners canceled the March 20, 1994 Parade and took significant steps to alter "the unique nature of the facts found as to the parade in controversy" in the state court proceedings.

On April 19, 1994, Petitioners adopted written Standards and Regulations for the governance of the Parade. *See* Federal District Court Case, Affidavit of John J. Hurley, July 11, 1994.[1]

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[1] The new Standards and Regulations announce that Petitioners will henceforth:

(1) identify the Petitioners' themes or messages, i.e., to honor St. Patrick; to celebrate the Petitioners' version of the role of traditional families throughout Irish history; and to commemorate the Petitioners' rejection of "judicially imposed messages on the parade of Sunday, March 20, 1994." (Standards & Regulations, ¶ 1(a) and Conclusion);

(2) establish formal, written procedures for selecting participants or sponsors, including a requirement that a letter of acceptance from the Parade Committee is necessary to participation as is a signed Parade Participation Agreement form. (*Id.*, ¶¶ 2(a)-2(g));

On April 20, 1994, the Petitioners applied for a permit to conduct the 1995 parade in accordance with their newly-promulgated Standards and Regulations. Petitioners indicated that the Parade would be "by invitation only" and set forth a three-fold theme first articulated in the April 19, 1994 Standards and Regulations: (1) to honor St. Patrick; (2) to celebrate the role of traditional families in Irish history; (3) and to commemorate the rejection of judicially-imposed messages on the 1994 parade. Letter from John J. Hurley to Francis Tramontozzi, April 20, 1994. By letter dated May 2, 1994, the City of Boston declined to act on the Petitioners' request, stating that it was premature. Letter from Francis Tramontozzi to John J. Hurley, May 2, 1994.

On July 12, 1994, the Petitioners commenced an action in the United States District Court for the District of Massachusetts. Petitioners represented in their federal court complaint that they had altered the nature of the

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(3) control any form of expression or message by sign, banner, symbol, word or deed deemed unsuitable by the Parade Committee by determining that only "banners, themes, messages, or displays approved by the Committee are allowed in the parade." (*Id.*, ¶¶ 4(a), 4(j), 4(k)); and

(4) obtain from potential participants, through a signed Parade Participation Agreement, a statement of, among other things: (a) the nature and content of the participant's signs or banners to be carried or displayed and any materials to be distributed; and (b) the participant's affirmation of the honesty and completeness of its representations, particularly anything "which might impact or adversely affect or alter in any way the expression intended as the theme of this Parade as articulated in the Standards and Regulations, Section I." (Parade Participation Agreement, pp. 2-3).

1995 Parade by adding a theme protesting the Supreme Judicial Court's decision against them and by adopting written Standards and Regulations that they indicated would be permanent.[2]

On January 17, 1995, the United States District Court (Wolf, J.) issued a Memorandum and Order declaring that "conditioning the issuance of a permit for the Veterans' 1995 St. Patrick Day Parade on the inclusion of GLIB violates the Veterans' rights of expressive association under the First Amendment of the United States Constitution." Federal District Court Case, Memorandum and Order, Jan. 17, 1995, slip op. at 69).[3]

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[2] In their verified complaint in the Federal District Court Case, Petitioners expressly allege that "in consideration of footnote [27 in the Massachusetts Superior Court decision which noted that '[t]his is not to say, however, that the Parade can never become a protected First Amendment activity'] the Veterans have defined in writing the theme of the March 19, 1995 St. Patrick's Day parade, and have enacted Rules and Regulations regarding the theme, the conditions of participation in future parades, and have prepared a document which will be distributed to all future participants, advising them that they must conform to the Veterans' Parade Rules and Regulations." (Complaint, ¶ 58).

[3] Judge Wolf relied on the inclusion of the protest theme as the grounds for his decision rather than the change in the rules. He was of the view that principles of collateral estoppel prevented him from deciding whether the new rules altered the Parade sufficiently to nullify the holdings of the state courts. Federal District Court Case, slip op. at 43.

III. DISCUSSION.

A case is moot if the passage of time and intervening events have cost it "its character as a present, live controversy of the kind that must exist if [this Court is] to avoid advisory opinions on abstract questions of law." *Princeton University v. Schmid*, 455 U.S. 100, 103 (1982) (per curiam) *quoting from Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam). In the present case, this Court has been asked to review a prospective injunctive order that was based on a Parade that was conducted under rules and with themes that, by Petitioners' representations, no longer obtain. On the basis of their representations, Petitioners have succeeded in excluding Respondent from the 1995 Parade. Thus, in the absence of a claim for money damages, it appears that nothing remains of the controversy that the Supreme Judicial Court sought to resolve in the judgment now pending on review in this Court.

For the purposes of this Court's Article III mootness assessment, the pertinent question is whether the parties have a genuine personal stake in this Court's determination of the legal issues they have brought before the Court. *See Lewis v. Continental Bank Corp.*, 494 U.S. at 478, 479 ("parties must continue to have a 'personal stake' in the outcome of the lawsuit"; " . . . the Article III question is not whether the requested relief would be nugatory as to the world at large, but whether [the prevailing party] has a stake in that relief"). Respondent suggests that the controversy addressed by the courts below is no longer a live one. The parties may indeed be at odds in the future over whether Respondent can participate in future Parades. However, Petitioners' actions have made that a different controversy, based on facts that Petitioners

claim are materially different, and raising different legal issues.

It is irrelevant for mootness purposes whether Petitioners' actions will, or will not, ultimately lead to a different legal result in the Massachusetts courts as to any violation of the state public accommodations laws or, for that matter, as to any violation of Petitioners' First Amendment rights. What does matter is that Petitioners have presented a new factual situation that requires a fresh legal determination of the rights of the parties. As events have developed, the only act which the decision below could affect was the exclusion of Respondent from the 1994 Parade, the date of which is irretrievably gone. As demonstrated by the Federal District Court Case, Respondent's rights with respect to future Parades will be decided on the basis of different facts, possibly resulting in different legal consequences. Therefore, the injunction granted below has become moot. *See* Stern, et al., Supreme Court Practice at 712 & n.16 (7th ed. 1993) (citing cases).

Where factual circumstances have changed, this Court has not hesitated to hold a controversy moot. For example, in *Princeton University v. Schmid*, 455 U.S. 100, a non-student was arrested for distributing political materials on campus without the permission required under University rules. The University, joined as a party to state court proceedings, urged its federal constitutional rights. However, while review was pending, the University "substantially amended its regulations governing solicitation, distribution of literature, and similar activities on University property by those not affiliated with the University." *Id.* at 103. Finding that the "issue of the validity

of the old regulation [was] moot" and that the validity of the revised regulation was not addressed below, this Court dismissed the appeal. *Id.* at 103; *cf. Gilligan v. Morgan*, 413 U.S. 1 (1973) (claim for injunctive relief against the National Guard arising out of events at Kent State; there had been a number of changes in the factual situation, including new "use of force" rules by the National Guard and revised training procedures; three members of the Court's five-member majority saw some basis for a conclusion of mootness; the four dissenters were convinced of mootness; and two concurring Justices found all but a small portion of the claim to be moot).

Moreover, none of the exceptions developed in this Court's mootness jurisprudence are applicable to this matter. The present case does not present a matter capable of repetition yet evading review. The case would presumably not be moot if the factual circumstances on which the lower courts predicated their ruling remained unchanged, despite the fact that Parades have come and gone. However, when the facts change and the legal issues change with them, it cannot be said that "the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam). That is the case here.

Further, Petitioners cannot complain about a dismissal for mootness because it is Petitioners' own actions that have brought about this result. Indeed, Petitioners took very specific actions with the intention of taking themselves outside the purview of the decisions below. Having reaped the benefits of their actions in the federal

district court litigation, they must also bear the consequences of having divested this Court of jurisdiction.

Nor is this is a factual situation invoking the "voluntary-cessation" doctrine of *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953) and its progeny. That doctrine applies where the defendant below puts an end to a challenged practice and claims that its action has mooted the controversy. Here, Petitioners have not ceased their challenged practice, i.e., the exclusion of Respondent from the Parade. Rather, Petitioners have worked – successfully to date – to alter the legal framework in which their ongoing intent to exclude GLIB will be considered by the courts.[4]

In sum, this case is moot both as a matter of the requirements of Article III as well as for prudential reasons. While prudential grounds might support stretching the bounds of mootness in some cases, this is not such a case. *See generally* Tribe, *American Constitutional Law* § 3.11, p. 93 (2d ed. 1988). On the contrary, the tension between the state anti-discrimination statute and the First Amendment should not be decided on the basis of ephemeral facts that have already changed enough to have persuaded the federal district court to grant Petitioners the relief they have sought. In this context, it

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[4] Even if the "voluntary-cessation" doctrine were somehow to apply in this case, there is no reasonable expectation that the Petitioners will return to the manner of running their parade as they did in 1993 (and intended to in 1994) where the courts below have warned them away from such a course. In such circumstances, this Court has found cases to be moot. *See, e.g., County of Los Angeles v. Davis*, 440 U.S. 625, 631-633 (1979); *DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974); *SEC v. Medical Committee for Human Rights*, 404 U.S. 403 (1972).

should be remembered that the state courts have made clear their view that the reach of the "public accommodation" provision of the state anti-discrimination law depends on the specific facts of the case, as does the applicability of Petitioners' First Amendment defense. ("We do not suggest that every parade is nonexpressive or that every parade is necessarily a place of public accommodation. Rather, we base our conclusion on the unique nature of the facts found as to the parade in controversy." *Irish-American Gay, Lesbian and Bisexual Group of Boston v. City of Boston*, 418 Mass. at 250 n.18.) Under the new facts created by Petitioners' actions, the state court may ultimately hold that post-1994 Parades are not "public accommodations" as a matter of state law, thereby avoiding the constitutional question. *Cf. Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

For all of the foregoing reasons, Respondent submits that the case is moot.[5]

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[5] Respondent submits that the proper action in this case is a dismissal without vacating the lower court's decision. As the Court recently made clear in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, ___ U.S. ___, 115 S. Ct. 386 (1994), mootness by "happenstance" provides reason to vacate the judgment below while mootness by voluntary action of the losing party does not entitle the losing party to vacatur. *Id.* at 391-392 and n.2. "The denial of vacatur is merely one application of the principle that '[a] suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks'." *Id.* at 392, *quoting from Sanders v. United States*, 373 U.S. 1, 17 (1963).

In the present case, mootness is the result of the voluntary actions of the petitioners; and, therefore, the petitioners are not entitled to vacatur of the judgment below.

In addition, in cases from state courts, vacatur has not been the Court's invariable practice. *Doremus v. Bd. of Education of the*

Respectfully submitted,

JOHN WARD, of Counsel
ZALKIND, RODRIGUEZ, LUNT
& DUNCAN
65A Atlantic Avenue
Boston, MA 02110
(617) 742-6020
Counsel of Record for Respondent

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Borough of Hawthorne, 342 U.S. 429, 434 (1952) (while the Supreme Court may not do so, state courts may render an opinion on a federal constitutional question even if it could be regarded as only advisory); *Bd. of License Commissioners of Tiverton v. Pastore*, 469 U.S. 238 (writ dismissed as moot); *Aikens v. State of California*, 406 U.S. 813 (1972) (per curiam) (writ dismissed as moot); *see Princeton University v. Schmid*, 455 U.S. 100 (appeal dismissed as moot).